Anna Vishev (AV 3601)
OSTROLENK, FABER, GERB & SOFFEN, LLP
1180 Avenue of the Americas
New York, New York 10036
Phone: (212) 382-0700
Fax: (212) 382-0888
E-mail: avishev@ostrolenk.com

Attorneys for Defendants

7/5357-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FAREPORTAL, INC. D/B/A CHEAPOAIR, Plaintiff, v. OPINION CORP. D/B/A PISSEDCONSUMER, Defendant.	Civil Action No. 08 CV 05964 (DLC)

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Defendant Opinion Corp. ("Opinion") hereby opposes Fareportal, Inc.'s Motion for a Preliminary Injunction (the "Motion"). Plaintiff Fareportal, Inc. ("Fareportal") has utterly failed to demonstrate any protectable right in the name CHEAPOAIR, whether by registration or use. Furthermore, even if in the unlikely event that Fareportal has proven a likelihood that it can establish at trial that it owns trademark rights in the name CHEAPOAIR, Fareportal has failed to establish that Opinion used the name CHEAPOAIR in commerce or that Opinion's use of the name CHEAPOAIR created a likelihood of confusion as to the source. Finally, granting the preliminary injunction would cause economic hardship to Opinion and stifle its customers rights to post comments and critiques about unsatisfactory services.

STATEMENT OF FACTS

Defendant Opinion Corp. (hereinafter "Opinion") is a New York corporation. (See, *Declaration of Alex Syrov*, Exhibit A, ¶2). Opinion owns and operates website www.pissedconsumer.com. *Id.* at ¶3 Domain name pissedconsumer.com is registered with the registrar GoDaddy.com. *Id.* As the name implies, website www.pissedconsumer.com provides a forum for consumers to post their opinions, complaints and other comments with respect to various product and/or service providers. *Id.* at ¶4 Additionally, Opinion allows the product/service providers to reply to the posted customers' complaints by posting their own comments. Thus, both sides of a transaction are given equal access to the pissedconsumer.com forum.

Plaintiff, Fareportal, Inc., d/b/a/ Cheapoair, (hereinafter "Fareportal") operates a website www.cheapoair.com providing on-line travel services. Some of Fareportal's customers posted unfavorable comments about Fareportal's services on the Opinion's website. Printouts of some of these comments are attached hereto as Exhibit B. As can be seen from the printouts, Fareportal had the opportunity to respond to all of these comments and indeed responded to some of them.

As any other domain name, pissedconsumer.com ends in a top-level domain name, i.e., "com", and includes a second-level domain name, i.e., "pissedconsumer". When visitors of pissedconsumer.com file a report they are requested to provide a title of the report, name of the company and name of the product. System constantly checks interest and volume of readers for each report. See *Syrov Declaration* ¶5. Once a particular report generates a predetermined number of hits, system uses the information provided by the consumer to create a sub-domain. *Id.* Accordingly, when the volume of readers of the reports concerning Fareportal's website exceeded a predetermined number, system created a sub-domain cheapoair.pissedconsumer.com. A listing of various reports posted by consumers with respect to Fareportal's website with the corresponding number of hits generated by each report is attached hereto as Exhibit E. Unlike domain names, sub-domains are not registered anywhere because they only exist in association with the domain name to categorize a portion of the website. See *Syrov Declaration* ¶6. An article from websitegear.com explaining the nature of sub-domains is attached hereto as Exhibit F. The article is offered for the convenience of the Court only.

Opinion generally uses three groups of meta tags on its website: Title Meta Tags, Description Meta Tags, and Keywords Meta Tags. When a consumer files a report, the system

summarizes the report and places this summary as a Description Meta Tag. See *Syrov Declaration* ¶7. A third-party Application Programming Interface ("API") is used to extract keywords from a consumer's report for the Keywords Meta Tags. Finally, a Title Meta Tag is generated directly from the title provided by the consumer. *Id.* Thus, generation of the meta tags on Opinion's website is consumer-report driven and depends on the keywords and other information provided by the consumers.

There are two types of in-text hyperlinks employed at individual pages of pissedconsumer.com: hyperlinks to third-parties' websites and links to other pages at pissedconsumer.com. *Id.* at ¶8 Opinion utilizes services of a third-party advertizing agency to generate hyperlinks to websites of others. These hyperlinks are generated in real time, i.e., when a page viewer opens a particular page certain words are converted into hyperlinks. If the page viewer points its cursor to such hyperlink, an informational pop-up message appears on the screen informing the viewer about where the hyperlinks are connecting to. The viewer may then click on the hyperlink and get redirected to the advertized third-party website. *Id.* Each pop-up message is clearly labeled with the advertized party's name, does not include any reference to the Fareportal's website or the CHEAPOAIR name and gives the viewer time and information sufficient to consider whether to connect to the third-party website. Opinion does not exercise any control over creation of the hyperlinks to the advertized websites. Contrary to the Fareportal's allegations, majority of the hyperlinks at report pages involving cheapoair.com are not connected to Plaintiff's competitors. Specifically, in the report dated August 5, 2008, Cheapoair Complaint by Barbie (see Exhibit B), the word "tickets" is linked to www.Jawbone.com (Bluetooth®-related services), the word "website" is linked to

www.SugarDaddyForMe.com (dating services), the word "email" is linked to www.blackberry.com and the word "reservation" is linked to www.Dell.com. None of these websites are travel-related. Moreover, the same word is typically linked to the same website at each page of pissedconsumer.com.

Opinion does not sell, provide or offer any travel-related products or services either at the pissedconsumer.com or otherwise. It simply offers a gripe site for dissatisfied consumers.

ARGUMENT

I. THE GENERAL STANDARDS FOR INJUNCTIVE RELIEF

Issuance of a preliminary injunction is a drastic and extraordinary remedy. See *JSG Trading Corp. v. Tray-Wrap,* Inc., 917 F.2d 75, 80 (2d Cir. 1980); *Borey v. National Union Fire Ins. Co.*, 934 F.2d 30, 34 (2d Cir. 1991); *Clairol, Inc. v. Gillette Co.*, 389 F.2d 264, 265 (2d Cir. 1968). To obtain a preliminary injunction in the Second Circuit, the moving party bears the burden of proving (a) irreparable harm, and (b) either a likelihood of success on the merits, or sufficiently serious questions going to the merits to make them a fair ground for litigation and that the balance of hardships tips decidedly in the movant's favor. *Fun-Damental Too Ltd. v. Gemmy Industries Corp.*, 111 F.3d 993 (2d Cir. 1997), *citing Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979) (*per curiam*). See also *Molloy v. Metropolitan Transportation Authority*, 94 F.3d 808 (2d Cir. 1996); *JSG Trading,* 917 F.2d at 79; *Dirk Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 135-36 (2d Cir. 1992). The movant must show a likelihood of success not only on the merits of its own claims, but as to the non-movant's defenses. Where, as here, a preliminary injunction will, if granted, provide the movant with

substantially all of the relief sought ultimately by it in the action, a heightened standard should be applied making it more difficult to obtain the injunction. See *Triebwasser & Katz v. AT&T,* 535 F.2d 1356, 1360 (2d Cir. 1976); *Knapp v. Walder*, 367 F. Supp. 385, 388 (S.D.N.Y. 1973); *Foundry Services, Inc. v. Beneflux Corp.*, 206 F.2d 214, 216 (2d Cir. 1953). As demonstrated below, Fareportal has not shown that it is entitled to the preliminary injunction it seeks under any applicable standard.

II. FAREPORTAL IS NOT ENTITLED TO THE PRELIMINARY INJUNCTION UNDER ITS LANHAM ACT CLAIMS

A. Fareportal is Unable to Establish Reasonable Probability of Success on the Merits

1. Opinion Corp. Has Not Infringed Any Trademark Rights in the Name CHEAPOAIR

(a) Plaintiff does not own any protectable trademark right in the name CHEAPOAIR

To establish a claim for trademark infringement a plaintiff must first prove ownership of a valid mark that is entitled to the protection of the law. See *Estee Lauder, Inc. v. The Gap, Inc.*, 108 F.3d 1503, 1508 (2d Cir. 1997); *The Sports Auth. v. Prime Hospitality Corp.*, 89 F.3d 955, 960 (2d Cir. 1996).

Fareportal's allegations regarding protectability of the name CHEAPOAIR as a trademark are convoluted at best. In its First Amended Complaint, Fareportal alleges that "Defendant's activities constitute infringement of Plaintiff's federally registered mark." See, *First Amended Complaint* (hereinafter "*Complaint*"), ¶15. However, Fareportal does not own a federal trademark registration for the name CHEAPOAIR. In fact, according to the records of the U.S. Patent and Trademark Office, an application for federal trademark registration for the

name CHEAPOAIR.COM was filed by an applicant having the same address as the Plaintiff and was refused by the Office under 15 U.S.C. 1052(d) as being nearly identical and likely to cause confusion with the existing mark CHEAPAIR INC. (Registration No. 28/90981). See Exhibit D.

Moreover, contrary to the Plaintiff's allegations, Fareportal does not even own a federal trademark registration in the slogan CHEAPOAIR.COM THE ONLY WAY TO GO. This slogan is the subject of the Trademark Application Serial No. 77/422393, which, as of the date of this writing, has not been allowed by the Trademark Office. See, Exhibit C.

As a result, Fareportal cannot rely upon any presumptions afforded by a federal trademark registration. *Lanham Act Section 7(b)*, 15 U.S.C.A. Section 1057(b) ("A certificate of registration . . . shall be prima facie evidence . . . of the registrant's ownership of the mark . . .").

Absent federally registered rights, Fareportal has to establish common law trademark rights. As Fareportal correctly stated in its Memorandum of Law in Support of Plaintiff's Motion for a Preliminary Injunction (hereinafter "Memorandum"), to be valid and protectable, a mark must be capable of distinguishing the products it marks from those of others. See, *Memorandum* at 11, *citing Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768, 112 S.Ct. 2753, 120 L. Ed. 2d 615 (1992) (citing 15 U.S.C. Section 1052). However, as evidenced by the decision of the Trademark Office, enclosed as part of the Exhibit D, name CHEAPOAIR.COM cannot distinguish services of the Plaintiff from services of American Travel Solutions, Inc. ("American"), the owner of the registered mark CHEAPAIR INC.

Specifically, American has registered CHEAPAIR INC. for "Travel agency services, namely making reservations and bookings for airplane transportation, car rentals and arranging cruises." See Exhibit D. Fareportal seeks to prove distinctiveness of

CHEAPOAIR.COM, a name which is nearly identical to CHEAPAIR. The marks are clearly designed and intended to create the same commercial impression, meaning and connotation in the minds of potential purchasers and end users of the identified services. Specifically, both marks create the impression of "air", as in "airfare", which is "cheap" or very inexpensive. Consumers will undoubtedly recognize and call for the services of both parties by the same wording, and are at least likely to be confused, therefore, with respect to the source of or origin of the services they seek. Moreover, the mark CHEAPAIR INC. is registered for the same services which are provided by Fareportal at its website. Both Fareportal and American offer travel services and offer bookings for the same types of travel. Services of both Fareportal and American are likely to be advertised through the same media and offered through the same channels of trade. Thus, the same consumers and consumer groups are likely to encounter the services of both companies, and consumer confusion regarding the source of the services encountered is highly likely. Thus, both the marks and the services are either identical or very similar. A mark which cannot distinguish services of its holder from services of another cannot be distinctive and cannot acquire a secondary meaning. Thus, Fareportal does not own any protectable trademark right in the name CHEAPOAIR.

(b) Opinion's Use of the Name CHEAPOAIR Does Not Meet The Commercial Use Requirement

To invoke the protections of the Lanham Act, a plaintiff must show that the alleged infringer used the plaintiff's mark "in connection with any goods or services." *15 U.S.C. § 1125(a)(1)*; *cf. Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 677 (9th Cir. 2005). This is commonly described as the commercial use requirement.

Fareportal argues that because Opinion's website is available on the Internet throughout the United States, Defendant's use of the name CHEAPOAIR on its website constitutes use in interstate commerce. See *Memorandum* at 16 (*citing Franchised Stores of New York, Inc. v. Winter*, 394 F.2d 664, 669 (2d Cir. 1968); *Planned Parenthood Federation of America, Inc. v. Bucci*, No. 97 Civ 0629, 1997 U.S. Dist. LEXIS 3338, 1997 WL 133313 (S.D.N.Y. March 24, 1997); *Intermatic Inc. v. Toeppen*, 947 F. Supp. 1227, 1239-40 (N.D. Ill. 1996)). Plaintiff mischaracterizes holdings of these courts.

It is important to distinguish between the merely jurisdictional "in commerce" requirement, see *15 U.S.C. §1125*, and the "in connection with any goods and services" requirement that establishes a violation of section 43 of the Lanham Act. See *Bosley*, 403 F.3d at 677. All three of the district court decisions that Plaintiff cites held that the use of a trademark on the Internet satisfies only the jurisdictional requirement. These courts concluded that each defendant's use of the trademark was in connection with goods and services, but based on facts other than the mere use of the Internet. Opinion agrees that Internet is generally an instrumentality of interstate commerce and that the jurisdiction of the Lanham Act constitutionally extends to unauthorized uses of trademarks on the Internet. However, this does not mean that any use of the Internet is necessarily commercial for the purposes of the Lanham Act, as Plaintiff advocates. Moreover, conflating these two "commerce" requirements would greatly expand the scope of the Lanham Act to encompass objectively noncommercial speech.

Fareportal's interpretation of the Lanham Act would encompass almost all uses of a trademark on the Internet, even when the mark is merely being used to identify the object of consumer criticism. This broad view of the Lanham Act is supported by neither the text of the

statute nor the history of trademark laws in this country. "Trademark laws are intended to protect" consumers from purchasing the products of an infringer "under the mistaken assumption that they are buying a product produced or sponsored by [the trademark holder]." *Beneficial Corp. v. Beneficial Capital Corp.*, 529 F. Supp. 445, 450 (S.D.N.Y. 1982). In *Wojnarowicz v. American Family Ass'n*, the court observed that Section 43(a) "has never been applied to stifle criticism of the goods or services of another by one . . . who is not engaged in marketing or promoting a competitive product or service. . ." 745 F. Supp. 130, 141-42, 17 U.S.P.Q.2D (BNA) 1337 (S.D.N.Y. 1990). The Lanham Act cannot be used as a pretext to stifle criticism of goods or services by someone, such as a consumer advocate, who is not engaged in marketing or promoting a competitive product or service. See, *Tzougrakis v Cyveillance, Inc.*, 145 F Supp 2d 325 (SD NY 2001). Limiting the Lanham Act to cases where a defendant is trying to profit from a plaintiff's trademark is consistent with the Supreme Court's view that "[a trademark's] function is simply to designate the goods as the product of a particular trader and to protect his good will against the sale of another's product as his." *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97, 63 L. Ed. 141, 39 S. Ct. 48, 1918 Dec. Comm'r Pat. 369 (1918); *see also* 1 McCarthy on Trademarks and Unfair Competition § 2:7 (4th ed. 2004). Thus, the appropriate inquiry is whether Opinion offers competing services to the public. Opinion is not Fareportal's competitor; it is Fareportal's critic. Moreover, Opinion's use of the CHEAPOAIR name is not in connection with a sale of goods or services – it is in connection with the expression of customers' opinions about Fareportal's goods and services.

The dangers that the Lanham Act was designed to address are simply not at issue in this case. The Lanham Act, expressly enacted to be applied in commercial contexts, does not

prohibit all unauthorized uses of a trademark. Opinion's use of the CHEAPOAIR name simply cannot mislead consumers into buying a competing product – no customer will mistakenly purchase a travel-related product from pissedconsumer.com under the belief that the product is being offered by Fareportal. Neither is Opinion capitalizing on the good will Fareportal has created in its mark. Any harm to Plaintiff arises not from a competitor's sale of a similar product under the CHEAPOAIR name, but from customer's criticism of Fareportal's goods and services posted on the Opinion's website. Plaintiff cannot use the Lanham Act either as a shield from customers' criticism at the Defendant's site, or as a sword to shut pissedconsumer.com up.

(c) Opinion's Use of the Name CHEAPOAIR Does Not Create The Likelihood of Confusion

Even if Defendant's use were determined to be commercial, it would only infringe upon Plaintiff's trademark rights if the use created a likelihood of confusion. *15 U.S.C. § 1125(a)(1)(A)*.

The likelihood of confusion inquiry entails consideration of the factors set forth in *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961): (1) the strength of plaintiff's mark; (2) the degree of similarity between plaintiff's and defendants' marks; (3) the proximity of the products; (4) the likelihood that either owner will bridge the gap, using the mark on products closer to the other's area of commerce; (5) the sophistication of the buyers; (6) quality of the defendants' product; (7) actual confusion; and (8) good or bad faith. See *TCPIP Holding Co., Inc. v. Haar Communications, Inc.*, 244 F.3d 88, 100, 2001 U.S. App. LEXIS 2867, 57 U.S.P.Q.2D (BNA) 1969 (2d Cir. 2001). A court's evaluation of these factors should not be mechanical, nor is any single factor determinative. See *Plus Prods. v. Plus Discount Foods, Inc.*,

722 F.2d 999, 1004 (2d Cir. 1983). Rather, a court should focus on the ultimate question of whether consumers are likely to be confused. See *Paddington Corp. v. Attiki Importers & Distribs., Inc.*, 996 F.2d 577, 584 (2d Cir. 1993).

As to the first factor, Fareportal alleges that its mark is strong and is entitled to protection. See *Memorandum* at 18. However, once again it is not clear which mark Plaintiff is referring to. As explained above, the name CHEAPOAIR is not distinctive, cannot acquire any secondary meaning and is not entitled to trademark protection at all. The slogan CHEAPOAIR.COM THE ONLY WAY TO GO may be entitled to protection. However, Plaintiff offered no evidence supporting a proposition that it is a strong mark. Specifically, Plaintiff states that it "has spent a significant amount of money to promote its mark. Sood declaration, ¶15" *Id.* However, paragraph 15 of the Declaration of Harsh Sood (hereinafter "Sood Declaration") states as follows:

> Ticket sales have dropped dramatically for Cheapoair from June 2008 in comparison to June 2007 due to the diversion of potential customers from the Cheapoair website. The loss in business revenue to Cheapoair for the month of June 2008 in comparison to June 2007 is more than seven (7) figures. *Sood Declaration* ¶15.

Nothing in the above cited paragraph indicates that Fareportal spent any money at all to promote any of its marks. Moreover, Opinion does not even use the above slogan on its website Accordingly, the first factor weighs in favor of the Defendant.

Opinion does not dispute that it uses the name CHEAPOAIR in its sub-domain and in its meta tags. Evidence that the alleged infringer chose a mark with the intent to copy, rather than randomly or by accident, typically supports an inference of likelihood of confusion. See *Planned Parenthood Fed'n of Am., Inc.*, 1997 U.S. Dist. LEXIS 3338, 1997 WL 133313, at

*3. However, such inference arises only if the alleged infringer intended to benefit from the reputation or goodwill of the trademark owner. See *Jordache Enters., Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482, 1485 (10th Cir. 1987). Opinion could not have intended to benefit from Fareportal's goodwill since it has created a forum for criticizing Fareportal's goods and services. In this context, Opinion's use of the name CHEAPOAIR should be viewed as critical parody where the benefit to the Defendant arises from the humorous or critical association and not from public confusion as to the source of the marks. Therefore, no inference of confusion can be drawn from the intentional use simply as a critical parody. Finally, the names of the Opinion's sub-domain cheapoair.pissedconsumer.com and Fareportal's cheapoair.com are not identical. While Defendant's sub-domain name contains the word "cheapoair" the use of the additional phrase "pissedconsumer" in itself suggests that the sub-domain contains criticism of the Plaintiff's site. The use of the word "pissedconsumer" would hardly serve as a "promotion" of Fareportal and/or its products. The second factor also weighs in favor of the Defendant.

Fareportal alleges that because the Plaintiff's and Defendant's websites are both located on the World Wide Web, these websites are in "close proximity" to each other. See *Memorandum* at 20. However, the proper inquiry under the Lanham act is not whether the websites are in close proximity to each other but whether the goods and services offered by the Plaintiff at its website are in close proximity to the goods and services offered by the Defendant at its website. Fareportal's website www.cheapoair.com provides travel services over the Internet to its customers. See *Sood Declaration* ¶10. Opinion's website www.pissedconsumer.com provides a forum for consumers to post critical commentaries on various companies, including the Plaintiff. See *Syrov Declaration* at ¶4. Opinion does not offer

any travel-related products or services on its website. Further, it would be immediately apparent to anyone visiting the pissedconsumer.com website (or any of its sub-domains) that it was not the Plaintiff's website due to the differences in content. Thus, the third factor also weighs in favor of the Defendant.

The issue with respect to the fourth factor is whether the two companies are likely to compete directly in the same market. See *Charles of the Ritz Group, Ltd. v. Quality King Distribs., Inc.*, 832 F.2d 1317, 1322 (2d Cir. 1987). Defendant does not operate an online travel agency and does not offer any travel-related products or services on its website or otherwise. It is true that the website www.pissedconsumer.com contains hyperlinks to third-parties' travel-related websites. However, when a consumer clicks on any of the hyperlinks, he/she is taken to a website clearly marked with a third-party name, domain name and often a trademark. Thus, any potential for confusion created by provision of such hyperlinks is mitigated by the lengthy path a consumer must take to reach the travel goods and services offered at such third-parties' websites. Further, the CHEAPOAIR name does not appear anywhere on such third-parties' website. The absence of the CHEAPOAIR name on the third-parties websites lessens the chance that a consumer would be mislead into believing that he/she is visiting the Plaintiff's online travel agency. Therefore, this factor does not weigh in favor of a finding of likelihood of confusion.

The fifth factor is the degree of care typically exercised by purchasers of the products linked to the trademark. Typically, consumers making their travel arrangements and purchasing travel products online are discerning and sophisticated about where they purchase their air tickets, book hotel reservations or make other travel arrangements. Travel products are typically an expensive purchase requiring careful consideration of multiple factors. Unsophisticated travel

purchasers typically delegate making travel arrangements to their travel agents. Therefore, this factor also does not weigh in favor of a finding of likelihood of confusion.

Because of the differences in the services provided by Opinion and Fareportal at their respective websites, the sixth factor is most likely irrelevant here.

With respect to the seventh factor, evidence of actual confusion is not necessary to show a likelihood of confusion, but it is the "best evidence of a likelihood of confusion in the marketplace." *Standard Oil Co. v. Standard Oil Co.*, 252 F.2d 65, 74 (10th Cir. 1958). Plaintiff presented no evidence of actual confusion. Thus, the seventh factor weighs in favor of the Defendant.

Finally, the eighth factor addresses whether the Defendant adopted the marks with the intention of capitalizing on Plaintiff's reputation and goodwill, as well as any customer confusion as to the source of the products. See *Cadbury Beverages, Inc. v. Cott Corp.*, 73 F.3d 474, 482-83 (2d Cir. 1996). As explained above, Opinion adapted the use of the name CHEAPOAIR with the intent of providing criticism of Plaintiff's services. Therefore, Opinion's use of the name CHEAPOAIR is a critical parody where the benefit to the Defendant arises from the humorous or critical association and not from consumer confusion as to the source of the marks or goods and services. Therefore, this factor also does not weigh in favor of a finding of likelihood of confusion.

On balance, the eight *Polaroid* factors weigh against a finding of likelihood of confusion. Although there is no likelihood of confusion based on this conventional analysis, the fact that the Defendant's website is a critical parody provides an even more convincing explanation of why consumers are unlikely to be confused.

(d) Opinion's Use of the Name CHEAPOAIR Does Not Create The Initial Interest Confusion

Fareportal argues that it is likely to prevail under the "initial interest confusion" doctrine. This relatively new and sporadically applied doctrine holds that "the Lanham Act forbids a competitor from luring potential customers away from a producer by initially passing off its goods as those of the producer's, even if confusion as to the source of the goods is dispelled by the time any sales are consummated." *Dorr-Oliver*, 94 F.3d at 382. According to Fareportal, this doctrine requires the Court to compare its name CHEAPOAIR with Opinion's sub-domain name, cheapoair.pisseconsumer.com, without considering the content of the Opinion's website. Fareportal argues that some people may go to cheapoair.pisseconsumer.com assuming it is Fareportal's site, thus giving Opinion an unearned audience – albeit one that quickly disappears when it realizes it has not reached Fareportal's site.

The few appellate courts that have followed the Ninth Circuit and imposed liability under this theory for using marks on the Internet have done so only in cases involving a factor utterly absent here – one business's use of another's mark for its own financial gain. See, e.g., *PACAAR Inc. v. Telescan Techs., L.L.C.*, 319 F.3d 243, 253 (6th Cir. 2003); *Promatek Indus., Ltd. v. Equitrac Corp.*, 300 F.3d 808, 812 (7th Cir. 2002); *Brookfield Communications, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 1055-56 (9th Cir. 1999). Profiting financially from initial interest confusion is thus a key element for imposition of liability under this theory. When an alleged infringer does not compete with the mark holder for sales, "some initial confusion will not likely facilitate free riding on the goodwill of another mark, or otherwise harm the user claiming infringement. Where confusion has little or no meaningful effect in the marketplace, it

is of little or no consequence in our analysis." *Checkpoint Sys. v. Check Point Software Techs., Inc.*, 269 F.3d 270, 296-97 (3d. Cir. 2001).

This critical element – use of another firm's mark to capture the mark holder's customers and profits – simply does not exist when the alleged infringer establishes a gripe site that criticizes the mark holder. See Hannibal Travis, *The Battle For Mindshare: The Emerging Consensus that the First Amendment Protects Corporate Criticism and Parody on the Internet*, 10 Va. J.L. & Tech. 3, 85 (Winter 2005) ("The premise of the 'initial interest' confusion cases is that by using the plaintiff's trademark to divert its customers, the defendant is engaging in the old 'bait and switch.' But because . . . Internet users who find [gripe sites] are not sold anything, the mark may be the 'bait, 'but there is simply no 'switch.'") (citations omitted). Applying the initial interest confusion theory to the Opinion's gripe site would enable Fareportal and other mark holders to insulate themselves from criticism – or at least to minimize access to it. Fareportal cannot use Lanham Act to shield itself from criticism by forbidding the use of its name in commentaries critical of its conduct. See, *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 33 (1st Cir. 1987). "Just because speech is critical of a corporation and its business practices is not a sufficient reason to enjoin the speech." *Id.* In sum, even if the Court were to accept the initial interest confusion theory, that theory would not apply in the case at hand. Rather, to determine whether a likelihood of confusion exists as to the source of a gripe site like that at issue in this case, a court must look not only to the allegedly infringing domain name, but also to the underlying content of the website. When it is done here, it is clear, as explained above, that no likelihood of confusion exists.

2. Opinion Has Not Diluted Any Trademark Rights in the Name CHEAPOAIR

The Federal Trademark Dilution Act ("FTDA") allows the "owner of a famous mark" to obtain "an injunction against another person's commercial use in commerce of a mark or trade name . . . ." *15 U.S.C. § 1125(c)(1)*. While the meaning of the term "commercial use in commerce" is not entirely clear, courts have interpreted the language to be roughly analogous to the "in connection with" sale of goods and services requirement of the infringement statute. See *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 903 (9th Cir. 2002) ("Although this statutory language is ungainly, its meaning seems clear: It refers to a use of a famous and distinctive mark to sell goods other than those produced or authorized by the mark's owner."); see also *Huthwaite, Inc. v. Sunrise Assisted Living, Inc.*, 261 F. Supp. 2d 502, 517 (E.D. Va. 2003) (holding that the commercial use requirement of the FTDA is "virtually synonymous with the 'in connection with the sale, offering for sale, distribution, or advertising of goods and services' requirement" of the Lanham Act). Moreover, FTDA explicitly states that the "noncommercial use of a mark" is not actionable. 15 U.S.C. 1125(c)(4). Congress explained that this language was added to "adequately address legitimate First Amendment concerns," H.R. Rep. No. 104-374, at 4 (1995), *reprinted in* 1995 U.S.C.C.A.N. 1029, 1031, and "incorporated the concept of 'commercial' speech from the 'commercial speech' doctrine." *Id.* at 8, *reprinted in* 1995 U.S.C.C.A.N. at 1035; *cf. Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554, 150 L. Ed. 2d 532, 121 S. Ct. 2404 (2001) (defining commercial speech as "speech proposing a commercial transaction") (internal quotation marks and citation omitted). The legislature believed this provision necessary to "protect the rights of Internet users and the interests of all Americans in free speech and protected

uses of trademarked names for such things as parody, comment, criticism, comparative advertising, news reporting, etc." S. Rep. No. 106-140 (1999), 1999 WL 594571, at *8.

As explained above, with respect to the trademark infringement analysis, Opinion's use of the name CHEAPOAIR does not raise to the standard of the "commercial use" within the meaning of the FTDA. Accordingly, Fareportal is not likely to succeed on the merits of its trademark dilution claim.

Further, FTDA applies only to mark that are distinctive and famous. 15 U.S.C. §1125 (c)(1). As explained above, the name CHEAPOAIR is not a famous or a distinctive mark either inherently or through an acquired secondary meaning.

Dilution can involve either blurring or tarnishment. Blurring occurs "where the defendant uses or modifies the plaintiff's trademark to identify the defendant's goods and services, raising the possibility that the mark will lose its ability to serve as a unique identifier of the plaintiffs' product." *Deere & Co. v. MTD Prods.*, 41 F.3d 39, 43 (2d Cir. 1994). "To determine the likelihood of blurring, we have looked to six factors, including: (i) the similarity of the marks; (ii) the similarity of the products covered; (iii) the sophistication of the consumers; (iv) the existence of predatory intent; (v) the renown of the senior mark; and (vi) the renown of the junior mark." *N.Y. Stock Exch.*, 293 F.3d at 558. Tarnishment, on the other hand, occurs where a trademark is "linked to products of shoddy quality, or is portrayed in an unwholesome or unsavory context, with the result that the public will associate the lack of quality or lack of prestige in the defendant's goods with the plaintiffs' unrelated goods." *Id.* (citation omitted).

Here, Fareportal advances the blurring theory of dilution. The relevant analysis has been completed in the previous discussion of the Polaroid factors. For the reasons discussed in that

section, Fareportal cannot succeed on the merits of its federal dilution claim.

3. Opinion's Use of the Name CHEAPOAIR Did Not Violate the Anti-Cybersquatting Protection Act

Congress enacted the Anti-Cybersquatting Protection Act ("ACPA"), *15 U.S.C. § 1125(d)*, to address "a new form of piracy on the Internet caused by acts of 'cybersquatting,' which refers to the deliberate, bad-faith, and abusive registration of Internet domain names in violation of the rights of trademark owners." S. Rep. No. 106-140, at 4 (1999). The ACPA provides for liability if a person registers, traffics in, or uses a domain name that is identical or confusingly similar to a distinctive mark, with a bad faith intent to profit from that mark. *15 U.S.C. § 1125(d)(1)(A)*.

To prevail on the cybersquatting claim, Plaintiff must show (1) that its trademark was distinctive at the time of registration of the domain name, (2) that the domain name *registered* by the Defendant is identical or confusingly similar to the Plaintiff's trademark, and (3) that the Defendant used or registered the domain name with a bad faith intent to profit. *Utah Lighthouse Ministry v. Foundation For Apologetic Information And Research*, 527 F.3d 1045, 2008 U.S. App. LEXIS 11523, *28 (emphasis added).

As discussed in the trademark infringement section above, Plaintiff cannot show that the name CHEAPOAIR is a distinctive trademark. Moreover, ACPA is clear that it concerns only with *registered* domain names. In the present case, Opinion has only registered domain name pissedconsumer.com. Cheapoair.pissedconsumer.com is a sub-domain and, as such, cannot be a registered domain name. As explained above, the automatically created sub-domains are not registrable.

As to the third element, Defendant does not use its sub-domains with a bad faith intent to profit. The ACPA enumerates nine nonexclusive factors to assist the court in determining whether the use of a trademark involves a bad faith intent to profit. See *15 U.S.C. § 1125(d)(1)(B)(i)*. It is not necessary to evaluate all of the factors because several of the factors readily defeat an inference that the Defendant intended to profit by using sub-domains similar to Plaintiff's name CHEAPOAIR. The quintessential example of a bad faith intent to profit is when a defendant purchases a domain name very similar to the trademark and then offers to sell the name to the trademark owner at an extortionate price. A defendant could also intend to profit by diverting customers from the website of the trademark owner to the defendant's own website, where those consumers would purchase the defendant's products or services instead of the trademark owner's. As explained above in more detail, neither of these purposes is evident here.

One factor is the domain name registrant's "bona fide noncommercial or fair use of the mark in a site accessible under the domain name." *15 U.S.C. § 1125(d)(1)(B)(i)(IV)*. Several courts held that a website that critiques a product and uses the product's trademark as the website's domain name may be a fair use. See *Lucas Nursery & Landscaping, Inc. v. Grosse*, 359 F.3d 806, 809 (6th Cir. 2004) (consumer registering domain name "lucasnursery.com" and complaining about nursery's work was not liable under ACPA); *TMI, Inc. v. Maxwell*, 368 F.3d 433 (5th Cir. 2004) (holding that a website with the purpose of informing other consumers did not create the harm the ACPA intended to eliminate); *Mayflower Transit, L.L.C. v Prince*, 314 F. Supp. 2d 362 (D.N.J. 2004) (finding no ACPA liability where Defendant registered "mayflowervanline.com," since the totality of circumstances demonstrated that registrant's motive was to express dissatisfaction in doing business with the mark's owner). Because

Defendant's sub-domain cheapoair.pissedconsumer.com offers critique of the Plaintiff's services and lacks an overt commercial purpose, it is similar to these consumer commentaries, and under the circumstances of this case, constitutes fair use.

Another factor is the defendant's intent to divert consumers to a website that "could harm the goodwill represented by the mark, either for commercial gain or with the intent to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site." *15 U.S.C. § 1125(d)(1)(B)(i)(V)*. As explained above, Opinion's sub-domain cheapoair.pissedconsumer.com does not create a likelihood of confusion as to source or affiliation. Accordingly, Opinion has not engaged in the type of conduct, i.e., "creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site," described as an indicator of a bad faith intent to profit in the statute. 15 U.S.C. §1125(d)(1)(B)(i)(V).

Finally, the ACPA contains a "safe harbor" provision, which precludes a finding of bad faith intent if "the court determines that the person believed and had reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful." *15 U.S.C. § 1125(d)(1)(B)(ii)*. Court in *Utah Lighthouse* determined that where the offending website was a parody, owner of the website could have reasonably believed that use of the domain names was legal. See, 2008 U.S. App. LEXIS 11523, *32. Similarly, Opinion's use of the name CHEAPOAIR in its third level domain names is a fair use critical parody and does not constitute a use in bad faith.

B. Fareportal Is Not Being Irreparably Harmed by Opinion's Use of the Name CHEAPOAIR

As explained above, Fareportal does not own any protectable right in the name CHEAPOAIR either under federal or state statute or under common law. Therefore, Fareportal cannot suffer any irreparable harm from Opinion's use of the name CHEAPOAIR. As further discussed above, Opinion's use of the name CHEAPOAIR is not in connection with any goods or services, does not create a likelihood of confusion as to the source and, therefore, cannot cause Plaintiff an irreparable harm.

III. FAREPORTAL IS NOT ENTITLED TO THE PRELIMINARY INJUNCTION UNDER ITS NEW YORK GBL CLAIM

A. Plaintiff is not Likely to Prevail on the Merits of its New York GBL Section 360-L Claim

Section 360-L of the New York General Business law provides:

> Likelihood of injury to business reputation or of dilution of the distinctive quality of a mark or trade name shall be a ground for injunctive relief in cases of infringement of a mark registered or not registered or in cases of unfair competition, notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services.

N.Y. Gen. Bus. Law §360-l.

"New York law accords protection against dilution to marks that are distinctive as a result of acquired secondary meaning as well as to those that are inherently distinctive." *N.Y. Stock Exch., Inc. v. New York, New York Hotel, LLC*, 293 F.3d 550, 557 (2d Cir.2002). As explained above, the name CHEAPOAIR is not a distinctive mark either inherently or through an acquired secondary meaning.

Similarly to its federal trademark dilution claim, Fareportal presses the blurring theory of

dilution. As with its federal trademark dilution claim, the relevant analysis has been covered in the previous discussion of the Polaroid factors. For the reasons discussed in that section, Fareportal cannot succeed on the merits of its New York dilution claim.

IV. BALANCE OF THE HARDSHIPS IS IN FAVOR OF THE DEFENDANT

Finally, the balance of hardships here tips decidedly in Defendant's favor. "It must be shown that the irreparable injury to be sustained ... is more burdensome [to the movant] than the harm caused to the [non-movant] through imposition of the injunction." *McLaughlin, supra* citing *Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp.* 70 A.D. 2d 1021, 1022, 418 N.Y.S. 2d 216 (3d Dep't. 1979). However, as shown above, Plaintiff has suffered no irreparable harm from the Opinion's use of the name CHEAPOAIR. Balanced against the absence of the irreparable harm to Fareportal is the ability of consumers to conveniently express criticism of Plaintiff's services. Further, granting the preliminary injunction will require the Defendant to invest a substantial amount of money in reprogramming its website. Accordingly, the balance of harships tips in the Defendant's favor.

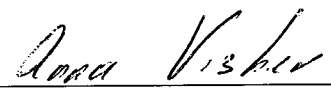
CONCLUSION

For the above stated reasons, Plaintiff's Motion seeking a preliminary injunction should be denied.

Respectfully submitted,

Dated: August 15, 2008
New York, New York

OPINION CORP., by its attorneys



Anna Vishev (AV 3601)
OSTROLENK, FABER, GERB & SOFFEN, LLP
1180 Avenue of the Americas
New York, New York 10036-8403
Tel: (212) 382-0700

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing **MEMORANDUM OF LAW IN OPPOSITION OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION** was served upon counsel for Plaintiff by ECF and First Class mail, postage prepaid, on this 15th day of August, 2008, addressed as follows:

Tedd Kessler, Esq.
Law Office of Tedd Kessler, P.C.
302 Fifth Avenue, 8th Floor
New York, NY 10001

Anna Vishev

Anna Vishev

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FAREPORTAL, INC. D/B/A CHEAPOAIR, Plaintiff, v. OPINION CORP. D/B/A PISSEDCONSUMER, Defendant.	Civil Action No. 08 CV 05964 (DLC) **LISTING OF EXHIBITS**

EXHIBIT A - Declaration of Alex Syrov

EXHIBIT B - Printout of sample pages from pissedconsumer.com

EXHIBIT C - Printout of the Trademark Office record for Application Serial No. 77/422393

EXHIBIT D - Printout of the Trademark Office record for Application Serial No. 78/740147

EXHIBIT E - Printout of a page from pissedconsumer.com

EXHIBIT F - SubDomain - The Third Level Domain

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FAREPORTAL, INC. D/B/A CHEAPOAIR, Plaintiff, v. OPINION CORP. D/B/A PISSEDCONSUMER, Defendant.	Civil Action No. 08 CV 05964 (DLC) **DECLARATION OF ALEX SYROV**

I, ALEX SYROV, under penalty of perjury, hereby declare as follows:

1. I am the Presedent of Opinion Corp., the Defendant in the above-named action.
2. Opinion Corp. is a New York corporation.
3. Opinion Corp. owns and operates the website www.pissedconsumer.com. Domain name pissedconsumer.com is registered with GoDaddy.com.
4. www.pissedconsumer.com provides a forum for consumers to post their opinions, complaints and other comments with respect to various product and/or service providers.
5. System operating pissedconsumer.com constantly checks interest and volume of

readers for each posted consumer report. Once a particular report generates a predetermined number of hits, system uses the information provided by the consumer to create a sub-domain.

6. Sub-domains of the pissedconsumer.com are not registered and exist only in association with the domain name.

7. Opinion Corp. generally uses three groups of meta tags on its website: Title Meta Tags, Description Meta Tags, and Keywords Meta Tags. When a consumer files a report, the system summarizes the report and places this summary as a Description Meta Tag. A third-party Application Programming Interface ("API") is used to extract keywords from a consumer's report for the Keywords Meta Tags. A Title Meta Tag is generated directly from the title provided by the consumer.

8. There are two types of in-text hyperlinks employed at individual pages of pissedconsumer.com: hyperlinks to third-parties' websites and hyperlinks to other pages at pissedconsumer.com. Opinion Corp. utilizes services of a third-party advertizing agency to generate hyperlinks to websites of others.

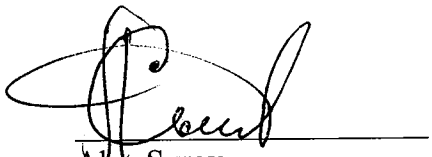
9. When a page viewer points its cursor to a hyperlink connecting to a third-party website, an informational pop-up message appears on the screen informing the viewer about where the link is connecting to. The viewer may then click on the hyperlink and get redirected to the advertized website.

10. Each pop-up message is labeled with the advertized party's name.

11. Opinion Corp. does not sell, provide or offer any travel-related products or services either at pissedconsumer.com or otherwise.

12. The foregoing is true and correct to the best of my personal knowledge, information and belief.

Dated: New York, New York
August 15, 2008



Alex Syrov

EXHIBIT B

CheapoAir has truly horrible service

Comments

cheapoair.com complaint by Kjboyd *May 21, 2008*

My wife booked tickets through this dismal outfit. She didn't find a space on the poorly-designed web form to indicate a child. Also, unlike every other online agency, there is no way to select seats. Since she was concerned that our 7-year-old would end up being placed apart from us, she called the company to get that corrected. The rep cancelled the reservations and remade them, informing my wife that it would cost $50 for the change (which should have been unnecessary and, if necessary, utterly trivial). It took two hours for this piece of magic to happen.

Since **CheapoAir** is such a low-quality firm, the credit card company flagged the $5000 charge as 'suspicious' and declined it. Upon learning of this, my wife contacted the credit card company to resolve the issue. She then attempted to contact **CheapoAir** again. After being put on hold for 45 minutes, she finally reached a rep. He asked for the booking number and then announced that he had a computer problem and asked her to call back in 10 minutes. (Huh? You ask your customers to call back?) In addition, **CheapoAir** claims they will charge $25 a ticket for the fact that the credit card company declined their suspicious activity.

Now we are hesitant to book through a more reliable company, since we don't know that **CheapoAir** won't submit the charge again. Trying to call results in long delays and being told to call back when you finally reach a human being. I am thoroughly disgusted with **CheapoAir**.

More cheapoair.com Reviews

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- Great service on Refunded Flight.
- CheapOair fraudulent practices - cheated the wrong costumer...A LAWYER
- Unaccompanied Minor
- Excellent prices and service
- Chepoair ripp off!

PISSED CONSUMER Discuss **cheapoair.com News** on our forums

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Comments (1) RSS

1. Written by **Customer Support**, on 21-05-2008 16:50

This is in regards to Mr. Boyds, posting. I have read over your file and our website is clearly marked for selecting a Child, Infant, and Senior citizen if needed. So this is clearly an oversite while the booking process took place. I do see that your wife called back to advise that she booked the child as an adult, but nothing was ever mentioned about seat assignments and that she was concerned about this, nor did she ask to have seats assigned. We did try and run the credit card and it was declined, this is not the fault of our agency that your credit card company has restrictions. We spoke with you at 10:28am and advised us to rerun the ticket, and you also called back at 10:45am, so the long hold times you claim I don't see that, for all transaction done on a reservation,puts a time stamp on the file..

Your tickets have been issued, and your child received a discounted fare. My conclusion on this is that the blame is being placed on Cheapoair.com for an error made by the person who made the reservation online resulting in fees that they felt they did not need to pay.

Report

Comments on **CheapoAir has truly horrible service**

Consumer Forum is another great place to discuss consumer concerns **NOT RELATED** to this article.

Name:

Comment:

Code:* 55210

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  GE CAPITAL CONS CARDCO complaints - FINANCE-Credit Cards
- Saxon Mortgage
  Saxon Mortgage aka Deutsche Bank
- Orbitrongold
  Shipper only paid for sum of the cost of freight?

Cheap O Air

Comments

Cheapoair complaint by Barbie *Aug 5, 2008*

I should have read the reviews before booking with **Cheap** O Air. They are not **cheap**.

I booked 2 tickets for Thanksgiving. $177.19 plus $105.90 for Taxes & fees, total $283.00 per ticket.

Went on Delta web site and the price for the same flight was $249.00 per ticket.

I called customer service of **Cheap** O Air and was informed that an additional $48.00 would be charged to my account for booking fees...total of each ticket $307.00..$58.00 more than Delta.

Stay away from this travel service. They are not **cheap**...They are a rip off! I will be contacting American Express and putting this in disputer plus a letter to the Beter Business Bureau.

More Cheapoair Reviews

- Cheapoair changed more than requested
- Don't use cheapo air!!!!
- Overcharged and did not refund or respond
- Cheapoair.com has the worst customer service in town and will not backup travel that are booked
- CheapOAir have the WORST customer support and policies

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1. Written by **Cheapoair Customer Support**, on 06-08-2008 15:02

Barbie, I have responded to your feedback email you had sent. I verified your charges, and you paid the exact airfare as Delta airlines $249.00 for your ticket. Yes we did charge a service fee, but it was 24.00 per ticket and there is two of you, that totals $48.00. So that is the only difference in the cost of the tickets, Cheapoair.com clearly states on our website that we charge upto 35.00 service fee for the processing and automation of your tickets. We do not hide this from our customers. If you where to contact the airline directly and speak with an agent, they also charge 25.00 per reservation, only is it free if you book through their website. Most online travel companies, and your local travel agents charge service fees for the handling of reservations.

I do apologize that you over looked the additional cost, but that is not the fault of Cheapoair.com. and no way does it make us a "rip off" for we do offer our customers great savings!

randrews

cheapoair.com

866-636-9088

Report

Comments on **Cheap O Air**

Consumer Forum is another great place to discuss consumer concerns **NOT RELATED** to this article.

Name:

Comment:

Code:* 94004

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Junior Gym
Knights Automotive
Walmart
Credit Solutions
Direct Tv
Wells Fargo
Kia Motors
Service Protection Direct

CheapOair fraudulent practices - cheated the wrong costumer...A LAWYER.

Comments

cheapoair.com complaint by JurisDoctor *Aug 1, 2008*

After spending half the day on the phone x a few hours per day in the last week trying to get confirmation for a flight - an email, several phone conversations and an itinerary for travel, one would expect that a ticket for a seat on an airline is available and ready and waiting for you, right. ABSOLUTELY NOT!

How absolutely frustrating when you show up at the airport, get your bags checked on only to be told that you have a "Reservation, but it has not been ticketed." What this simply means in layman's terms is they didn't pay the airline for your ticket that they "confirmed" they had for you. Your checked in bag leaves while you are left behind wondering what happened.

So, you spend several hours being shuffled back and forth between Cheapoair's HORRIBLE customer service and US Air representatives on the phone (which happens to have GREAT customer service comparatively). With each company blaming each other it is hard to determine who to point the finger at but alas, the winner of the WORST TRAVEL AGENCY IN THE WORLD belongs to cheapoair.com. Not only did they not book the flight, but they led us to believe that it was confirmed and all that needed to be done was show up.

We had to buy a last minute ticket (which we all know costs an arm and a leg) that we wouldn't have had to if they had not misled us in the first place.

Unfortunately for them, we are from a family of lawyers who loves to fight for justice in every aspect of life. We do not support those who lie, cheat or steal and that is exactly the motto of their company as demonstrated by their less than professional business etiquette. Even if the mistake was an oversight it would have been more acceptable had the customer service representatives been more understanding and accommodating rather than sour and audibly annoyed.

I encourage any and all who have been grieved by cheapoair to act on it. I am personally peeved and have a mission to use the legal system

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  Saxon Mortgage aka Deutsche Bank

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to work through these unfortunate and unnecessary situations. If you would like to help out, please send a brief description of the incident to the email address of This e-mail address is being protected from spam bots, you need JavaScript enabled to view it . Don't worry...I am not spammer and if you're unsure, please open a new email account to pay caution. Bottom line - I KNOW CHEAPOAIR.COM to practice in misleading and **fraudulent practices** and would like to stop their abuse of unsuspecting future customers. What they have done is absolutely unacceptable.

-A disgruntled customer

Quote this article on your site | Views: 53

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1. Written by **Email me at IhatecheapOAir @ g**, on 01-08-2008 13:46

Since apparently my email will not show up, please refer to and modify the email line below to send any correspondence.

Email me at IhatecheapOAir @ gmail dot com

Report

Comments on **CheapOair fraudulent practices - cheated the wrong costumer...A LAWYER.**

Consumer Forum is another great place to discuss consumer concerns **NOT RELATED** to this article.

Name:

Comment:

Code:* 79371

☐ I wish to be contacted by email regarding additional comments

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EXHIBIT C

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2008-08-15 16:45:58 ET

Serial Number: 77422393 Assignment Information Trademark Document Retrieval

Registration Number: (NOT AVAILABLE)

Mark

(words only): CHEAPOAIR.COM THE ONLY WAY TO GO!!

Standard Character claim: No

Current Status: Applicant's response to a non-FINAL office action has been entered in application.

Date of Status: 2008-07-11

Filing Date: 2008-03-14

Filed as TEAS Plus Application: Yes

Currently TEAS Plus Application: Yes

Transformed into a National Application: No

Registration Date: (DATE NOT AVAILABLE)

Register: Principal

Law Office Assigned: LAW OFFICE 107

Attorney Assigned:
SOMERVILLE ARETHA CHARESE

Current Location: L70 -TMEG Law Office 107

Date In Location: 2008-07-16

LAST APPLICANT(S)/OWNER(S) OF RECORD

1. Fareportal, Inc.

Address:
Fareportal, Inc.
Suite 1201 213 West 35th Street
New York, NY 10001
United States
Legal Entity Type: Corporation
State or Country of Incorporation: New York

GOODS AND/OR SERVICES

International Class: 039
Class Status: Active
Providing links to web sites of others featuring travel; Travel and tour information service; Travel and tour ticket reservation service
Basis: 1(a)
First Use Date: 2005-10-15
First Use in Commerce Date: 2005-10-15

ADDITIONAL INFORMATION

Color(s) Claimed: The color(s) grey and red is/are claimed as a feature of the mark.

Description of Mark: The mark consists of the letters "cheap" in grey lowercase lettering with a red curved underline, the letter "O" in red capital lettering, the letters "air" in grey lowercase lettering, the letters ".com" in red lowercase lettering, the words "the only way to" in grey lowercase cursive lettering, and the word "go!!" in red lowercase cursive lettering..

Design Search Code(s):
26.17.09 - Bands, curved; Bars, curved; Curved line(s), band(s) or bar(s); Lines, curved
26.17.13 - Letters or words underlined and/or overlined by one or more strokes or lines; Overlined words or letters; Underlined words or letters

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

NOTE: To view any document referenced below, click on the link to "Trademark Document Retrieval" shown near the top of this page.

2008-07-16 - Amendment From Applicant Entered

2008-07-16 - Communication received from applicant

2008-07-15 - PAPER RECEIVED

2008-07-11 - Teas/Email Correspondence Entered

2008-07-10 - Communication received from applicant

2008-07-11 - Assigned To LIE

2008-07-10 - TEAS Response to Office Action Received

2008-06-25 - Notification Of Non-Final Action E-Mailed

2008-06-25 - Non-final action e-mailed

2008-06-25 - Non-Final Action Written

2008-06-21 - Assigned To Examiner

2008-03-20 - Notice Of Design Search Code And Pseudo Mark Mailed

2008-03-19 - New Application Entered In Tram

ATTORNEY/CORRESPONDENT INFORMATION

Attorney of Record
Yuval D. Bar-Kokhba, Esq

Correspondent
YUVAL D. BAR-KOKHBA, ESQ
GARBARINI & SCHER, P.C.
432 PARK AVE S
NEW YORK, NY 10016-8013

EXHIBIT D

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Serial Number: 78740147 Assignment Information Trademark Document Retrieval

Registration Number: (NOT AVAILABLE)

Mark

cheapoair.com

(words only): CHEAPOAIR.COM

Standard Character claim: Yes

Current Status: Abandoned-Failure To Respond Or Late Response

Date of Status: 2006-12-11

Filing Date: 2005-10-25

Transformed into a National Application: No

Registration Date: (DATE NOT AVAILABLE)

Register: Principal

Law Office Assigned: LAW OFFICE 112

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

Current Location: M3X -TMO Law Office 112 - Examining Attorney Assigned

Date In Location: 2006-12-11

LAST APPLICANT(S)/OWNER(S) OF RECORD

1. JEN NY

Address:
JEN NY
Suite #1201 213 West 35th Street

New York, NY 10001
United States
Legal Entity Type: Corporation
State or Country of Incorporation: New York
Phone Number: 212-391-2313

GOODS AND/OR SERVICES

International Class: 039
Class Status: Active
Travel services, namely making reservations and bookings for flights, car rentals, vacations, cruises, and tours
Basis: 1(a)
First Use Date: 2005-07-01
First Use in Commerce Date: 2005-07-01

International Class: 043
Class Status: Active
Travel services, namely making reservations and bookings for hotels
Basis: 1(a)
First Use Date: 2005-07-01
First Use in Commerce Date: 2005-07-01

ADDITIONAL INFORMATION

(NOT AVAILABLE)

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

NOTE: To view any document referenced below, click on the link to "Trademark Document Retrieval" shown near the top of this page.

2006-12-11 - Abandonment Notice Mailed - Failure To Respond

2006-12-11 - Abandonment - Failure To Respond Or Late Response

2006-04-30 - Non-final action e-mailed

2006-04-30 - Non-Final Action Written

2006-04-27 - Assigned To Examiner

2005-10-31 - New Application Entered In Tram

ATTORNEY/CORRESPONDENT INFORMATION

Correspondent
JEN NY
213 W 35TH ST RM 1201
NEW YORK, NY 10001-1903
Phone Number: 212-391-2313

Document Description: **Offc Action Outgoing**
Mail / Create Date: **30-Apr-2006**

Previous Page | Next Page | You are currently on page 1 of 3

To: JEN NY (victor@cheapoair.com)

Subject: TRADEMARK APPLICATION NO. 78740147 - CHEAPOAIR.COM - N/A

Sent: 4/30/2006 9:30:38 AM

Sent As: ECOM112@USPTO.GOV

Attachments: Attachment - 1
Attachment - 2

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 78/740147

APPLICANT: JEN NY

78740147

CORRESPONDENT ADDRESS:
JEN NY
213 W 35TH ST RM 1201
NEW YORK, NY 10001-1903

RETURN ADDRESS:
Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

MARK: CHEAPOAIR.COM

CORRESPONDENT'S REFERENCE/DOCKET NO: N/A

CORRESPONDENT EMAIL ADDRESS:
victor@cheapoair.com

Please provide in all correspondence:

1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address.

OFFICE ACTION

RESPONSE TIME LIMIT: TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE MAILING OR E-MAILING DATE.

MAILING/E-MAILING DATE INFORMATION: If the mailing or e-mailing date of this Office action does not appear above, this information can be obtained by visiting the USPTO website at http://tarr.uspto.gov/, inserting the application serial number, and viewing the prosecution history for the mailing date of the most recently issued Office communication.

Serial Number 78/740147

The assigned examining attorney has reviewed the referenced application and determined the following.

STATUTORY REFUSAL(S)

The examining attorney refuses registration under Trademark Act Section 2(d), 15 U.S.C. §1052(d), because the applicant's mark, when used on or in connection with the identified goods/services, so resembles the mark in U.S. Registration No. **2890981** as to be likely to cause confusion, to cause mistake, or to deceive. TMEP §§1207.01 *et seq*. See the enclosed registration.

The examining attorney must analyze each case in two steps to determine whether there is a likelihood of confusion. First, the examining attorney must look at the marks themselves for similarities in appearance, sound, connotation and commercial impression. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). Second, the examining attorney must compare the goods or services to determine if they are related or if the activities surrounding their marketing are such that confusion as to origin is likely. *In re August Storck KG,* 218 USPQ 823 (TTAB 1983); *In re International Telephone and Telegraph Corp.*, 197 USPQ 910 (TTAB 1978); *Guardian Products Co., v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978). TMEP §§1207.01 *et seq*.

The goods/services of the parties need not be identical or directly competitive to find a likelihood of confusion. They need only be related in some manner, or the conditions surrounding their marketing be such, that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods/services come from a common source. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984); *Guardian Products Co., Inc. v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978). TMEP §1207.01(a)(i).

CHEAPAIR INC. is previously registered for "Travel agency services, namely making reservations and bookings for airplane transportation, car rentals and arranging cruises." The applicant seeks the exclusive right to use CHEAPOAIR.COM, a mark which is nearly identical to CHEAPAIR. The marks are clearly designed and intended to create the same commercial impression, meaning and connotation in the minds of potential purchasers for and end users of the identified services. Specifically, both marks create the impression of "air" as in "airfare" and the like which is "cheap" or very inexpensive. Consumers will undoubtedly recognize and call for the services of both parties by the same wording, and are at least likely to be confused, therefore, with respect to the source of or origin of the services they seek.

The mark is registered for the same services for which the applicant seeks registration. Both parties offer travel services and offer bookings for the same types of travel. The services of both parties are likely to be advertised through the same media and offered through the same channels of trade. Thus, the same consumers and consumer groups are likely to encounter the services of both parties, and consumer confusion regarding the source of the services encountered is highly likely. In this case, both the marks and the services are either identical or very similar, Thus, the Office must refuse registration pursuant to Trademark Act Section 2(d).

Finally, the examining attorney must resolve any doubt as to the issue of likelihood of confusion in favor of the REGISTRANT and against the applicant who has a legal duty to select a mark which is totally dissimilar to trademarks already being used. *Burroughs Wellcome Co. v. Warner-Lambert Co.*,

203 USPQ 191 (TTAB 1979).

Although the examining attorney has refused registration, the applicant may respond to the refusal to register by submitting evidence and arguments in support of registration.

If the applicant chooses to respond to the refusal to register, the applicant must also respond to the following.

GOODS/SERVICES/CLASSIFICATION/FEES - INTERNATIONAL CLASS 39 ONLY

The recitation of services is unacceptable as indefinite because "vacations" is indefinite and could include or reference services outside of International Class 39. The applicant may adopt the following Class 39 recitation, if accurate: Travel services, namely making reservations and bookings for flights, car rentals, cruises, and tours.. TMEP §1402.11.

Please note that, while an application may be amended to clarify or limit the identification, additions to the identification are not permitted. 37 C.F.R. §2.71(a); TMEP §1402.06. Therefore, the applicant may not amend to include any goods or services that are not within the scope of the goods and services recited in the present identification.

/JMBK/
Jennifer M.B. Krisp
Attorney, Law Office 112
571-272-9183 [leave message]

HOW TO RESPOND TO THIS OFFICE ACTION:

- ONLINE RESPONSE: You may respond using the Office's Trademark Electronic Application System (TEAS) Response to Office action form available on our website at http://www.uspto.gov/teas/index.html. If the Office action issued via e-mail, you must wait 72 hours after receipt of the Office action to respond via TEAS. **NOTE: Do not respond by e-mail. THE USPTO WILL NOT ACCEPT AN E-MAILED RESPONSE.**
- REGULAR MAIL RESPONSE: To respond by regular mail, your response should be sent to the mailing return address above, and include the serial number, law office number, and examining attorney's name. **NOTE: The filing date of the response will be the *date of receipt in the Office*,** not the postmarked date. To ensure your response is timely, use a certificate of mailing. 37 C.F.R. §2.197.

STATUS OF APPLICATION: To check the status of your application, visit the Office's Trademark Applications and Registrations Retrieval (TARR) system at http://tarr.uspto.gov.

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GENERAL TRADEMARK INFORMATION: For general information about trademarks, please visit the Office's website at http://www.uspto.gov/main/trademarks.htm

FOR INQUIRIES OR QUESTIONS ABOUT THIS OFFICE ACTION, PLEASE CONTACT THE ASSIGNED EXAMINING ATTORNEY SPECIFIED ABOVE.

TDR Home

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Record 1 out of 1

Typed Drawing

Word Mark	CHEAPAIR INC.
Goods and Services	IC 039. US 100 105. G & S: Travel agency services, namely making reservations and bookings for airplane transportation, car rentals and arranging cruises. FIRST USE: 19940201. FIRST USE IN COMMERCE: 19940201
Mark Drawing Code	(1) TYPED DRAWING
Serial Number	76537322
Filing Date	August 14, 2003
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	July 13, 2004
Registration Number	**2890981**
Registration Date	October 5, 2004
Owner	(REGISTRANT) American Travel Solutions, Inc. CORPORATION CALIFORNIA 16055 Ventura Blvd. #405 Encino CALIFORNIA 91436
Attorney of Record	Mark V.B. Partridge
Disclaimer	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE INC. APART FROM THE MARK AS SHOWN
Type of Mark	SERVICE MARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

EXHIBIT E

Pissed Consumer
I'm Pissed

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Lost Password?
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- Fedex
  Terrible customer service FedEx International
- Target
  Target gift receipt gets return price that is currently showing.
- Yoursavingsclub
  Unauthorized charge
- Unishippers
  Unishippers complaint
- Lenscrafters
  Lenscrafters - Bad Glasses

Home » Company Reviews » Cheapoair

Cheapoair

Cheapoair.com is a website that brings airfares, hotels, car rentals and vacationa packages information from numerous sources. The company offers a huge selection of cheap plane tickets, airline tickets and cheapest airfares. With the help of Cheapoair it is very easy to book the tickets online and to plan a vacation. Cheapoair provides business class fares, first class fares, a number of different top deals, weekend getaways, seasonal travel tickets, tickets for international flights, for Europe flights, Caribbean flights, Mexico flights, domestic flights, Canada flights, and so much more.

In addition, Cheapoair offers different travel resources, travel tips, it provides airline codes, news, travel glossary and many other things available on Cheapoair.com.

Consumer Rating: 29 Review Points

Best Consumer Reports:

- **Cheapoair.com reviews - TRAVEL**
- **Cheapo air misleading website**
- **CheapoAir is the worst, stay away from them**
- **CheapOair is horrible.**
- **Cheapo Air agent failed to make promised cancellation, I'm stuck !**

Date	Cheapoair Reviews	Hits
08/08	Cheapoair changed more than requested	63
08/05	Cheap O Air	78
07/24	Don't use cheapo air!!!!	222
07/23	Overcharged and did not refund or respond	102
07/20	cheapoair.com has the worst customer service in town and will not backup travel that are booked.	86
07/06	CheapOAir have the WORST customer support and policies	137
07/02	Great experience with Cheapoair.com	212
06/30	discount handled no problem	110
06/20	8 Months still not refund	260
06/20	CheapOair is very sorry; yes they are!	277
06/12	Cheapoair charges an enormous amount of fee	363
06/04	it will take more than ten words	234
05/23	Cheapoair Takes Forever to Complete a Refund	145
05/21	Cheap O Air-AWFUL	591
05/18	Class action lawsuit on CheapOair.com	658
05/02	Cheapoair sold non-existing flights	454
04/24	CHEAPOAIR WILL COST YOU	391
04/23	Trying to book a flight with CheapO	467
04/19	Cheapo Air- Nothing short of Fraud!	520
02/01	Cheapo air misleading website	2118
01/30	Cheapo Air agent failed to make promised cancellation, I'm stuck !	710
01/06		903

- AUCTIONS
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- CONS
- CONSUMER
- DELIVERY
- EDUCATION
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- HEALTH
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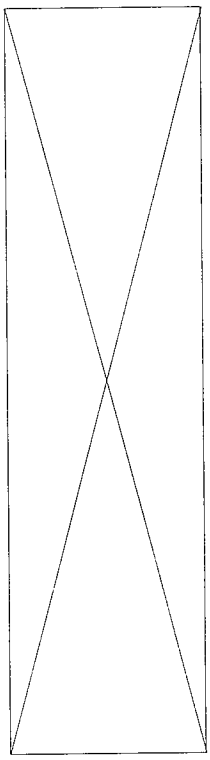

- Girls Gone Wild
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- Raymore and Flanigan

Hot Topics

CheapoAir is the worst, stay away from them

10/30	Cheapoair Customer Service	379
10/22	Renee Cheapoair Customer Service	300
09/11	AVOID CHEAPOAIR	557
09/01	CheapOair is horrible.	796
08/23	Cheapoair.com Reviews	525
07/26	Cheapoair.com reviews - TRAVEL	3039
07/26	Cheapoair.com, Arijit opinion - Travel Agents	479

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Results 1 - 29 of 29

Airlines

Consumer Airline reviews about reservations, flight schedules, ticket specials, travel planning, membership, and airline industry news. Share your airline experience with other consumers.

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- JetBlue Airways *(4 items)*
- Worry Free Vacations *(4 items)*
- Consumer Wholesale Travel *(4 items)*
- Frontier Airlines *(3 items)*
- Singapore Airlines *(3 items)*
- Emirates Airlines *(3 items)*
- Air Jamaica *(3 items)*
- Amex *(2 items)*
- Ryan Air *(2 items)*
- Expedia.com *(2 items)*
- Jack Pujji - Lowest Airfare Finder *(2 items)*

Our Friends

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EXHIBIT F

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SubDomain - The Third Level Domain

Published: Friday, March 12, 2004

What is a subdomain?

A subdomain is the part of the website address before the domain name. For example, the address for WebsiteGear forum is **http://forum.websitegear.com**. Here, forum is a subdomain of the domain name websitegear.com. Subdomains are also known as the third level domains or canonical names. A subdomain, unlike a domain name, is not registered anywhere because it is associated with a domain name only. It can be created by the web host on the DNS server. The most commonly used subdomain is **www**, as in http://www.websitegear.com. However, there is no need to add www in front of the domain name. Similarly, mail server addresses often have mail as the subdomain, as in **mail.websitegear.com**.

Why are subdomains used?

Subdomains are commonly used to categorize portions of the website. For example, the services offered by WebsiteGear are categorized by their subdomains, such as poll.websitegear.com or rating.websitegear.com. The benefit is that the subdomain can be easily moved to another server if the category gets very popular.

Subdomains are also used by free webhosting providers to resell web space under their own domain name (e.g. **http://membername.hostname.com**). Each member will have their subdomain, however, they all will still share the domain name of the hosting provider.

The third reason for using a subdomain name is to load balance the web servers for a high traffic website. Multiple web servers are assigned different subdomains like www.sitename.com, www1.sitename.com, www2.sitename.com etc, though each of them contain the same application code. When the request comes from the browser, the load balancing software redirects it to one of these servers. DNS load balancing is a simple method of load balancing using subdomains pointing to different IP addresses.

Types of subdomain setup

Subdomain can be setup in different ways, although the subdomain information is stored similarly in the DNS server.

1. **Separate Site:** This type of subdomain setup will the have a separate hosting account or hosting location with respect to the domain hosting account. The hosting provider usually assigns new resources (disk space, bandwidth etc.) for this subdomain and charges fees as if it is another hosting account. There is often no way to share common files (such as include files by relative path) between the

domain account and subdomain account.

2. **Sub-Directory Pointing:** In this case, the subdomain is pointed to a sub-directory of the web root folder. For example, subdomain.domain.ext will point to /account/www/subdomain directory. Essentially, the resources of the domain in this case are shared by the subdomain as well. Usually the hosting provider does not charge additional fees (other than subdomain setup fees). Both the domain and subdomain can also reuse the same common files (such as SSI includes) from the same shared directory location.

3. **Separate Server:** This type of configuration is similar to the separate site configuration but hosted on a separate server with a different IP address. In this case the subdomain can reside at a totally different geographical location. The advantage of having a separate server for a subdomain is in load distribution among servers (by separating application functionality) or providing horizontal scaling in case of load balancing between servers (by identical replication of application code on each server).

More On Sub-Domains

More detailed discussions on subdomains and cookie handling within subdomains is provided in the next section. Click here.

Tips On Using SubDomain